

testimony concerning Capitol's purpose in transmitting the tones would have been unfavorable.

27. When Stone saw the engineers obtain a connection to the Huntington terminal so that they could view its data concerning testing, he left the room. The connection was broken almost immediately, and at the same time, the test pages ceased and were not heard again. When the connection was renewed, the test set up had been disabled and all the program variables had been deleted. Walker perceived this at the time as an attempt to hide something. Again, Stone's failure to testify concerning this gives rise to an inference that is unfavorable to Capitol. It must be concluded that while out of the room Stone effectuated or ordered the disconnection of the terminal, the disabling of the testing, and the deletion of the program variables. Since Stone was aware of the engineers' interest in the testing, this is another serious incident of lack of candor.

28. Disabling and deleting the testing function was not, of course, a completely successful method of concealing Capitol's continuous "testing." It appeared to the engineers that Harrison, who walked in on the inspection cold, recreated the testing function the way it had been. The fact of concealment, however, may be more significant than the facts concealed. FCC v. WOKO, 329 U.S. 223, note 10 at 227 10 (1946). See also, Leflore Broadcasting Company, Inc. v. FCC, 636 F.2d 454, note 38 at 461-2 (D.C. Cir. 1980) and Pass Word, Inc., 76 FCC 2d 465, 509 (1980), aff'd sub nom. Pass Word, Inc. v. FCC, 673 F.2d 1363

(D.C. Cir. 1982).

29. Capitol gave inconsistent explanations as to where the test function could be controlled and turned on and off at the time of the inspection. At the inspection the engineers were led to believe that this function could be controlled at Huntington. Capitol's office manager Wilson had contacted Huntington to effect a connection with the Huntington terminal. The connection was obtained but immediately broken. When they were reconnected, the testing function had been disabled, the program variables deleted and the testing had stopped. Harrison, the Huntington manager, told the engineers that his secretary there realized they were sending out test pages without having anyone in the field to receive them so she disabled the test. Yet Harrison has repeatedly claimed that the test function could only be controlled from Charleston at the time of the inspection in August 1991. Either that claim was not true or else the testing was disabled and the variables deleted in Charleston while Stone was out of the room and the Huntington office was directed to disconnect the engineers to cover up this activity. This is another incident of Capitol's misrepresentation or lack of candor. The plain fact is that Capitol was engaged in a coverup.

30. There are additional inconsistencies concerning the location or locations from which the testing (and other functions of the paging terminal) could be controlled. Both Harrison and Raymond testified that Capitol's new computer system now allows it to be controlled from either Huntington or Charleston.

Raymond testified that the new system cost \$100,000, but, incredibly, in view of the price, could not recall when it was purchased. He further testified that there has been a dial up modem line on the Charleston terminal for 8 to 10 years that allows the testing and any other function to be controlled from anywhere. The inconsistent and evasive statements on this matter are misrepresentations.

31. Raymond testified that testing with shorter tones was unreliable in setting off pagers. At the inspection the engineers had asked for a test using shorter tones. Although Capitol's pagers were Motorola equipment, which, in McCallister's view, is the best, Capitol provided the engineers with a defective pager. This ensured that the test would not work. When the engineers saw through this ploy and obtained a working pager, the test worked. Capitol had attempted to defend the amount of air time its tests consumed by providing the engineers with a pager that was guaranteed to show that using shorter tones would not work. Providing the engineers with a defective pager was a further effort to obstruct a lawful Commission inspection and hide the licensee's true activities.

32. Stone's statement to the engineers that there was someone in the field to receive the tests was a falsehood. Harrison's claim, made in his September 29, 1992, statement under penalty of perjury and reiterated at the hearing, that the testing around August 1991 was for the Greenup County Rescue Squad is a misrepresentation because the testing was to three

paggers, not the 10 or 15 required by the rescue squad, and because it is unlikely that the 76 watt transmitter could provide service to Greenup County. Additionally, Harrison assisted the engineers at the inspection and did not mention Greenup County to them as a reason for the testing. As noted above, Harrison's claim that he engaged in testing while driving home must either be a misrepresentation or an admission of excessive testing.

33. Raymond was consistently evasive, refusing to be pinned down either on a purpose for the testing or on identifying anyone receiving tests, and thus lacked candor on these points. While he indicated to the engineers that he did not know the purpose of the testing or how it was accomplished, at the hearing he demonstrated intimate knowledge of programming the terminal, e.g., explaining the chaining commands step by step.

34. Capitol made inconsistent and evasive statements concerning whether the testing was running around the clock for days at a time as observed by the engineers and charged by the complaint of RAM, or whether it was turned off, for example, at night. Harrison testified that he would have the autotest feature put on during his drive home from Huntington to Charleston and on one occasion his secretary forgot to have it turned off and it ran all night.

35. Raymond's June 17, 1992, statement under penalty of perjury responding to the Commission's May 17, 1992, 308(b) letter contains a carefully phrased statement to the effect that Harrison forgot to turn the testing off during the August 12-15,

1991, period. Aside from that, Raymond was evasive, stating generally that Capitol was testing regularly and doing a lot of testing. Either Harrison's statement, made both orally and in his September 29, 1992, statement under penalty of perjury, that his secretary forgot to turn the testing off one night or Raymond's statement that Harrison forgot to turn the testing off the whole week is a misrepresentation. Additionally, Raymond's evasiveness shows a lack of candor.

36. Raymond testified that it is necessary to test regularly and that use of the autotest feature is routine. Yet the testing stopped during the inspection and RAM never complained about tones again. Either Raymond lied about the amount of testing that is actually routinely necessary or else the sudden cessation shows Capitol's acknowledgement that the constant testing was unnecessary.

37. Capitol's misrepresentations and lack of candor are an independent ground for revocation of its licenses. They are related to covering up the extent of the "tests," the lack of any purpose for the "tests" except interference and the fact that even after months of operation Capitol had almost no customers, indicating that its purpose was not to run a PCP business but to have an excuse for PCP transmissions to disrupt its competitor's business. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1210-11 (1986), recon., 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C.

Cir. June 11, 1987), as modified, 5 FCC Rcd 3252, 3253 (1990) (to cover non broadcast licensees), recon., 6 FCC Rcd 3448 (1991).

38. The Commission has long held misrepresentation and lack of candor to be serious offenses. It has revoked licenses because of misrepresentations. See Nick J. Chaconas, 28 FCC 2d 231, 232-3 (1971). The Commission has revoked Public Mobile Radio Service (RCC) licenses, like those that are the subject of this proceeding, because of misrepresentations. See Pass Word, Inc., 76 FCC 2d 465 (1980), aff'd sub nom. Pass Word, Inc. v. FCC, 673 F.2d 1363 (D.C. Cir. 1982).

39. Lack of candor, which "involves concealment, evasion, and other failures to be fully informative," as distinguished from misrepresentation, which "involves false statements of fact," is equally disqualifying. Both "represent deceit." Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983).

July 1991 Interference

40. The tones that disrupted RAM's pages in July 1991 and were identified with Capitol's call sign were the same tones that the FCC engineers conclusively traced to Capitol and that Capitol acknowledged transmitting. It is therefore concluded that these were additional instances of willful and repeated interference. This interference described by RAM makes the interference case against Capitol even worse as it shows that the tones were transmitted for a far longer period than the time that the FCC engineers directly observed. Additionally, in view of Capitol's explanation that the tones they transmitted were tests, it is

concluded that the July 1991 tones were additional willful and repeated violations of Section 90.405(a)(3) of the Commission's Rules.

November 1990 Interference

41. It is concluded that during November 15-18, 1990, Capitol retransmitted its RCC traffic on 152.480 MHz and caused willful and repeated interference to RAM and additionally violated Sections 90.173(b), 90.403(c) and 90.415(b) of the Commission's Rules. The testimony of three of RAM's principals is clear that they heard a "stereo" effect when they listened to 152.480 MHz and Capitol's RCC frequency simultaneously on two scanners. Capitol's motive is likewise clear: to disrupt a competitor's service in the hope of attracting RAM's existing and potential customers to itself. Raymond's 1994 claim that Capitol's PCP station was not operating then is not believable in light of his contemporaneous response to RAM's November 1990 complaint which did not mention this seemingly conclusive excuse.

42. Peters, Capitol's long-time engineering consultant, testified that Capitol did not consult him concerning this complaint. Nor does Raymond mention anywhere any investigation he undertook to find the cause. This is significant because the allegation involved retransmission of Capitol's RCC station. Raymond would have been concerned that the retransmission might result from some malfunction or mischief at the RCC station, unless he already knew the cause, which was Capitol.

43. By the time of the hearing, Capitol accepted the

occurrence of the simultaneous transmissions as fact and concentrated its defense on an explanation that would eliminate Capitol as the cause. Peters theorized that the retransmissions were due to intermodulation, in which two signals mix and produce a signal on a third frequency. Walker doubted the intermodulation explanation, stating that with intermodulation some distortion and likely more than one signal is heard. In view of the testimony that the signals on the two channels sounded like stereo, it is concluded that intermodulation was not the cause. Raymond's suspicious failure to investigate the occurrence adds cogency to this conclusion.

1992 Selective Retransmissions

44. The record shows as well that Capitol continued its interference, albeit in a more sophisticated mode, even after the Commission sent it a \$20,000 NAL on July 30, 1992. Issue g in the HDO concerning the 1992 selective retransmissions pertains to the proposed \$75,000 forfeiture as well as Capitol's basic qualifications. Issue g specified violations of willful or repeated transmissions on 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) and transmitting common carrier paging traffic in violation of Section 90.415(b). The record shows that these transmissions were willful and repeated interference as well.

45. The record shows that there were selective retransmissions of Capitol's RCC paging traffic in 1992, well

after Capitol had begun operating. RAM was alerted to this problem by customer complaints of false paging. On investigation RAM found that the false pages on 152.480 MHz had been transmitted shortly before on Capitol's RCC frequency. RAM's customers received the false pages because they had the same cap codes as Capitol's RCC customers that had been paged. In August 1992 Luke Blatt used two Hark verifiers to decode digital paging traffic on 152.510 MHz, Capitol's RCC frequency, and 152.480 MHz, the shared PCP frequency. He found that some pages on 152.510 MHz were going out a short time later on 152.480 MHz. He noted a Morse code ID on the 152.480 MHz transmissions and found it was Capitol's. He used the Hark verifiers again on October 28, 1992, with the same results, and repeated the procedure every two or three weeks thereafter to verify there was still a problem. Blatt explained how to cause the selective retransmissions, by chaining some subscriber numbers on the RCC channel to the same numbers on the PCP channel.

46. Raymond articulated for the first time at the hearing that the retransmissions resulted from sabotage. He suggested that the chaining commands that were entered into Capitol's paging terminal to cause the selective retransmissions were entered either by an unidentified person who accessed the terminal by its dial up modem line or who walked in the back door of the office unobserved and accessed the terminal directly. Raymond is not the first licensee accused of interference to blame it on sabotage or a mysterious unknown source. See James

W. Smith, supra, 102 FCC 2d at 276. His speculation should be rejected as hopelessly self-serving.

47. Peters preferred an alternative, more elaborate explanation for the selecting and retransmitting of certain of Capitol's common carrier pages. This would involve taking Capitol's signal off the air, putting it through a Hark verifier to decode the information, using a PC to select some of the pages, and then retransmitting those pages through a small paging terminal and small transmitter. Peters' theory, while not involving the use of Capitol's own equipment, is even more convoluted than Raymond's. Here, the simple explanation that Capitol caused the retransmissions by chaining in its own terminal is by far the most believable. Therefore it is concluded that Capitol directly caused the retransmissions in its own terminal without the aid of trespassers or additional pieces of equipment installed at various sites.

48. Raymond was vague about when he learned of RAM's complaint of the selective retransmissions, but acknowledged that he would have learned about it from a December 1992 Commission response to Capitol's FOIA request. Again, if Capitol were not involved in causing the retransmissions, Raymond would have consulted Peters or taken some other steps to investigate the occurrence when he learned of it. Further, if Capitol were not the intentional source of the retransmissions, Capitol's own PCP business on the same frequency would have been affected.

49. The findings establish and it is concluded that:

a. Capitol willfully and repeatedly caused WNSX-646 to transmit in a manner that caused harmful interference in violation of Section 90.403(e) of the Commission's Rules and Section 333 of the Communications Act during November 1990 and July 1991;

b. Capitol willfully and repeatedly caused WNSX-646 to transmit in a manner that caused harmful interference in violation of Section 90.403(e) of the Commission's Rules and Section 333 of the Communications Act on August 12, 13, 14 and 15, 1991;

d. Capitol willfully and repeatedly caused WNSX-646 to transmit tests in such a manner that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference in violation of Section 405(a)(3) of the Commission's Rules on August 12, 13, 14 and 15, 1991;

e. Capitol willfully and repeatedly caused WNSX-646 to identify its transmissions by Morse code at a rate less than 20-25 words per minute in violation of Section 90.425(b)(2) of the Commission's Rules on August 12, 13, 14 and 15, 1991;

f. Capitol willfully and repeatedly caused WNSX-646 to transmit common carrier paging traffic for purposes other than completing private carrier pages in violation of Sections 90.173(b), 90.403(c) and 90.415(b) of the Commission's Rules during November 1990;

g. Capitol willfully and repeatedly caused WNSX-646 to transmit common carrier paging traffic for purposes other than completing private carrier pages in violation of Sections 90.173(b), 90.403(c) and 90.415(b) of the Commission's Rules from August 1992 through August 1993;

h. and i. Capitol misrepresented facts to the Commission and was lacking in candor in written and oral statements concerning the above matters and willfully and repeatedly violated Section 1.17 of the Commission's Rules; and

m. Capitol filed its PCP application to obtain a license primarily for the purpose of causing interference to WJN-621, licensed to RAM.

No evidence was adduced concerning issue c., which must be resolved in Capitol's favor. Issue n. was deleted.

Ultimate Conclusions

1. It is concluded that Capitol's willful and repeated

violations of Section 333 of the Communications Act and Sections 90.403(e), 90.405(a)(3) and 90.425(b)(2) demonstrate that it lacks the requisite qualifications to be a Commission licensee and warrant the imposition of the \$20,000 forfeiture proposed in the Commission's July 30, 1992, NAL. The fact that Capitol engaged in these violations to benefit the stations which are the subject of this proceeding makes revocation of those licenses imperative along with the additional sanction of monetary forfeiture.

2. It is concluded that Capitol's misrepresentations and lack of candor show that it lacks the qualifications to be a Commission licensee and are a separate basis for revocation of all its licenses. Its misrepresentation and lack of candor include obtaining a license for a PCP station not for the purpose of serving paging customers but for the purpose of disrupting a competitor's legitimate paging business on the same channel; engaging in interference under the guise of "testing;" and attempting to cover its tracks when the Commission sought to investigate the interference and "testing." Indeed, the deceit continues to this day.

3. The conclusion that Capitol's licenses must be revoked and a forfeiture imposed is additionally strengthened by the fact that Capitol continued its violations and continued to disrupt its competitor's business even after receiving a Notice of Apparent Liability and did not stop until it turned off its mischievous PCP station for good after the Commission issued the HDO in this proceeding. For this reason, additionally, a \$75,000

forfeiture for the 1992 violations of Sections 90.173(b), 90.403(c) and 90.415(b) must be imposed. Pursuant to the Policy Statement on Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon., 57 FR 24986 (June 14, 1992), the \$75,000 maximum specified in the HDO should be imposed. Not only has Capitol not introduced any evidence pertaining to the downward adjustment criteria, the record shows most of the upward adjustment criteria: egregious misconduct; intentional violation; substantial harm; prior violations of the same or other requirements; substantial economic gain; and repeated or continuous violation. id. at 4700. The fact that the specified violations for which the \$75,000 forfeiture was proposed were accompanied by willful and repeated interference to disrupt the business of a competitor is an additional reason why the full \$75,000 should be imposed.

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CERTIFICATE OF SERVICE

I, Rosalind M. Bailey, a secretary with the Private Radio Bureau, hereby certify that on this 8th day of April, 1994, copies of the foregoing **Private Radio Bureau's Proposed Findings of Fact and Conclusions of Law** were served, by first-class U.S. mail, upon the following:

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